IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application made in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka

Democratic Socialist Republic of Sri Lanka

Complainant

C.A. Case No: **CA 278 – 280/ 2007**

H.C. Colombo Case No: **HC 2006/2004**

Vs.

1. Mohamed Samoon Mohamed Shiyam
2. Jayagodage Upali Abeygunawardena
3. Murshida Shiyam *alias* Mohammed Mubarak Murshida

Accused

AND NOW BETWEEN

1. Mohamed Samoon Mohamed Shiyam
2. Jayagodage Upali Abeygunawardene
3. Murshida Shiyam *alias* Mohammed Mubarak Murshida

Accused- Appellants

Vs.

The Attorney General
Attorney-General's Department,
Colombo 12.

Respondent

BEFORE	:	K. K. Wickremasinghe, J. Janak De Silva, J.
COUNSEL	:	Faisz Musthapha, PC with AAL Nivantha Satharasinghe for the 1st Accused-Appellant Rienzie Arseculeratne, PC with AAL Thilina Punchihewa, AAL Ganeshan Premkumar, AAL Udara Muhandiramge, AAL Namal Karunaratne, AAL Thejitha Koralage and AAL Chamindri Arseculeratne for the 2nd Accused-Appellant Anil Silva, PC with AAL Nandana Perera for the 3rd Accused-Appellant ASG Ayesha Jinasena, PC with DSG Chethiya Gunasekare and SC Chrisanga Fernando for the Complainant-Respondent
ARGUED ON	:	05.11.2018, 07.11.2018, 08.11.2018, 09.11.2018, 13.11.2018, 15.11.2018, 26.11.2018, 28.11.2018, 04.12.2018, 06.12.2018, 07.12.2018, 10.12.2018, 11.12.2918, 12.12.2018, 13.12.2018, 06.02.2019, 12.02.2019, 25.03.2019.
WRITTEN SUBMISSIONS	:	All the parties – On 17.05.2019
DECIDED ON	:	04.07.2019

K.K.WICKREMASINGHE, J.

The accused-appellants filed the appeals bearing No. CA 278/2007, 279/2007 and 280/2007 seeking to set aside the judgment of the Learned High Court Judge of Colombo dated 14.12.2007 and orders of sentences dated 14.12.2007 and 17.12.2007 in Case No. HC. 2006/2004. All parties agreed to take up all three appeals together and to abide by one judgment.

Facts of the case:

The Accused-Appellants were indicted in the High Court of Colombo under the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984. The indictment carried six counts as follows;

1. **Count 01** – against the 1st accused-appellant for possession of 1.290 kg of heroin, an offence punishable under section 54A (d) of the Poisons, Opium and Dangerous Drugs Ordinance (hereinafter referred to as the 'Ordinance')
2. **Count 02** – against the 1st accused-appellant for trafficking of 1.290 kg of heroin, an offence punishable under section 54A (b) of the Ordinance
3. **Count 03** – against the 2nd accused-appellant for abetting the 1st accused-appellant in trafficking of 1.290 kg of heroin, an offence punishable under section 54B of the Ordinance
4. **Count 04** – against the 1st and 3rd accused-appellants for possession of 7.796 kg of heroin (joint possession), an offence punishable under section 54A (d) of the Ordinance
5. **Count 05** - against the 1st accused-appellant for trafficking of 7.796 kg of heroin, an offence punishable under section 54A (b) of the Ordinance

6. **Count 06** – against the 3rd accused-appellant for abetting the 1st accused-appellant in trafficking of 7.796 kg of heroin, an offence punishable under section 54B read with 54A (b) of the Ordinance.

At the conclusion of the trial, the Learned High Court Judge convicted and sentenced the accused-appellants as follows;

1. The 1st accused-appellant (hereinafter referred to as the '1st appellant') was convicted of count No. 01, 02, 04 and 05.
2. The 2nd accused-appellant (hereinafter referred to as the '2nd appellant') was convicted of count No. 03.
3. The 3rd accused-appellant (hereinafter referred to as the '3rd appellant') was convicted of count No. 06.

Accordingly the 1st and 2nd appellants were sentenced to death and the 3rd appellant was sentenced to life imprisonment.

Being aggrieved by the said judgment, all three appellants preferred appeals to this Court. The appeals numbered CA 278/2007, 279/2007 and 280/2007 were taken up together in this Court.

The prosecution case

The prosecution called seven witnesses and marked productions from 'P1 to P34B' in the trial. The incident was narrated by the prosecution as follows;

Police Sergeant Rajitha received information regarding a drug dealer on 27.11.2003 from one of his informants and he had mentioned this to IP Liyanage of Police Narcotic Bureau (hereinafter referred to as the 'PNB'). Accordingly IP Liyanage arranged a team of officers to report to PNB on 28.11.2003 in order to conduct a raid. On 28.11.2003 early morning, the informant came to the PNB and

met IP Liyanage. [vol. 2 – page 770]. The informant disclosed that one Shiyam in a house at Ward Place in Colombo was involved in trafficking of drugs with one Upali. After discussion, 21 officers left the PNB in three vehicles at 0635hrs and the vehicle driven by PCD Prasad carrying IP Liyanage, PS Rajitha, the private informant, IP Nimal Perera, IP Tennakoon and PC Priyantha reached the particular house in Ward Place around 7.10am. The investigation team positioned in separate places and had been watching the 1st appellant's house. IP Liyanage instructed the team to be vigilant about a trishaw which was expected to be coming in order to collect heroin.

IP Liyanage summoned SI Nalaka and PS 30762 Senaratne since they had some knowledge of the 1st appellant. IP Liyanage testified that he took such step as it was necessary to identify the house, the trishaw and the 1st appellant by someone apart from the informant. [vol. 2 – pages 279, 281, 282, and 283]. The investigation team observed a car bearing No. GG – 4488 driven by a female had gone into the house around 8.10am. She was identified, by the informant, as the wife of the 1st appellant. Later around 8.30am it was observed that some garbage was kept outside in the pavement [vol. 2 – page 64] and milk bottles were delivered to house around 9.30am. The officers in a trishaw at the Wijerama Mawatha then informed IP Liyanage of the arrival of the trishaw bearing number GU-4308 which they were expecting [vol. 2- page 62]. The said trishaw came and parked in front of the house of the 1st appellant. The 2nd appellant got down from the trishaw and proceeded towards the small gate carrying two black colour bags. At that moment, the 1st appellant came out from the gate and collected those two bags from the 2nd appellant [vol. 2 – page 70]. Thereafter, the 1st appellant returned to the house and the 2nd appellant was waiting inside the trishaw. After about 10 minutes, 1st appellant came back with a white colour bag.

At this juncture, IP Liyanage walked towards the 1st appellant and IP Tennakoon, PC Priyantha and PS Mahinda too had quickly arrived at the scene [vol. 2 – page 74].

IP Liyanage searched the white colour bag at the pavement and found that there was a Tulip type bag. Inside that bag was another black colour bag which contained a transparent bag with a brown powder [vol. 2 – pages 74, 75]. IP Liyanage identified the contents of the bag as heroin. Accordingly he arrested both the 1st appellant and the 2nd appellant.

Subsequently the officers went inside the house with both appellants. At this juncture, IP Liyanage had told the 1st appellant that the entire house would be searched and if there was anything illegal to inform the officers before that. The 1st appellant responded by offering information that unauthorized drugs were in the bag under a bed in a particular room [vol. 2 - page 79 & judgment 628]. Accordingly the officers entered to a room on the left hand side after passing the main hall. The 3rd appellant was arranging clothes in an almirah in the said room. Upon searching the room, the officers found a blue colour travelling bag under the bed, in which they found 10 bags of heroin in a transparent bag, cash, few scales, weights & an electronic scale [vol. 2 – pages 80, 86, 87, 88, 90, 91].

The officers searched the rest of the house but no other unauthorized drug could be recovered. Thereafter the 3rd appellant was arrested and the team of officers returned to the PNB on the same day.

Defence Version

After closing the prosecution case, an application under section 200 of the Code of Criminal Procedure Act was made on behalf of the 2nd and the 3rd appellants. The

said applications were rejected by the Learned High Court Judge and defence was called from all three appellants.

Accordingly all three appellants made dock statements and following witnesses were called on behalf of the 1st and the 2nd appellants.

- 1st Appellant
    1. Maheegamala Jayathilaka
    2. Ranasinghe Sembulage Sunil Fonseka
    3. Kuragaha Wimalaratne – the Registrar of the Magistrate's Court of Maligakanda
    4. R.A. Priyantha Wijesiri De Silva (The Magistrate and the additional District Court Judge)
- 2nd Appellant
    1. Buhari Abdul Latheef
    2. W. Sriyantha Ranjan Kumara
    3. Buddhika Prasad Balachandra, OIC
    4. PS P. Karunathilaka

The defence case was concluded after the dock statement of the 3rd appellant. However the daughter of the 1st and 3rd appellants was called as a witness to testify in the inquiry that was held with regard to a video recording of the raid.

The incident narrated by the defence is as follows;

Defence witness Sunil Fonseka testified that on 27.11.2003 around 11.30pm one Kelum and one Sanjeewa brought two black bags and put into a basin in the slums near his house [vol. 3 – pages 270, 271, 272, 273]. A group of persons entered the house of Sunil on 28.11.2003 in the morning around 4.30am and inquired whether he got anything from Sanjeewa. Rajitha and Priyantha of Narcotic were said to be

in the team [vol. 3 – page 275]. Sunil fonseka testified that Nimal Perera of narcotic alleged to have come after about two minutes. Thereafter they searched the house and recovered the two bags that were brought and placed by Sanjeewa and the PNB officers alleged to have brought Sanjeewa too [vol. 3 – page 277]. Sanjeewa admitted the ownership of those bags. Thereafter they were taken to a white van in which Kelum was and Sanjeewa requested the officers to release Kelum since he admitted the ownership of bags. Accordingly, Kelum was dropped off at Madampitiya junction [vol. 3 – page 283].

The said witness Sunil Fonseka further testified that the team reached Slave Island around 5.30 am and met IP Amarajith at his quarters at Slave Island. Both the IP and Pujitha Jayasundera came to inspect the drugs. At that point, Kelum came in a trishaw and spoke with IP Amarajith and Pujitha [vol. 3 - page 282]. It was further testified that they were taken near the Dawatagaha Mosque and the PNB officers blocked a trishaw and put the two bags into that trishaw [vol. 3 – page 284]. The driver of the said trishaw was assaulted, hand cuffed and was made to sit at the back of the van. After the alleged 'abduction' the van travelled up to Cary College and IP Tennakoon got down at Cary College. Thereafter the van and the trishaw proceeded to Ward Place and the van was parked near a house [vol. 3 – page 285]. Sunil fonseka further testified that a car was entering the house and Priyantha and Bandara took two bags from the trishaw and went into the house at the same time [vol. 3 – page 289].

Thereafter sunil and others waited for about 2 to 3 hours near the house at Ward Place and some persons were videoing [vol. 3 - page 290]. After some time, the van left Ward Place and they were dropped at Fort since Sanjeewa told IP Tennakoon that they wanted to go home [vol.3 – page 291].

The Learned President's Counsel for all three appellants raised many questions of law and grounds of appeal at the stage of argument. I will list them below as it was submitted in the argument and in the written submissions.

For the 1st Appellant

1. Exclusion of video evidence
2. Flows in the 'chain' relating to the dispatch and receipt of productions to and from the Government Analyst
3. Misdirection with regard to the burden of proof
4. Omission to permit production of the bed

For the 2nd Appellant

1. The Learned High Court Judge failed to consider certain items of evidence that cast a doubt as to the credibility of the witnesses regarding the manner in which the appellants were arrested
2. The Learned High Court Judge failed to consider evidence favourable to the defence that the IBs pertaining to this case maintained by the PNB were tampered.
3. The video pertaining to the incident was unreasonably shut out by the Learned High Court Judge.
4. The Learned High Court Judge failed to take into account that certain inter-say contradictions occasioned a failure of justice
5. Evidence of Latheef, the three-wheeler driver who saw the incident of abduction of the 2nd appellant was unreasonably rejected.
6. The Learned High Court Judge failed to take into account the malice demonstrated by the officers of the PNB

7. The Learned High Court Judge failed to consider the role played by Chief Inspector Amarajith
8. Defence witness Sunil Fonseka alias Patta's evidence was unreasonably rejected by the Learned High Court Judge.

For the 3rd Appellant

1. Is there any evidence that the 3rd appellant was even present when the alleged trafficking took place?
2. The prosecution did not prove beyond reasonable doubt that the 3rd appellant had knowledge of the Heroin that was under the bed.
3. The presence of the 3rd appellant in the room in not sufficient to prove knowledge
4. Was there a possibility that the 1st appellant made use of the opportunity when the 3rd appellant was not at home to commit these offences?
5. The subsequent conduct of the 3rd appellant cannot be used against her for the conviction.

One of the main contentions for all three appellants was that a video of raid should have been admitted in evidence and the non-admission of the video caused a grave miscarriage of justice to the appellants.

It was the position of the defence that there was a video recording of the raid at the residence of the 1st and 3rd appellants. One daughter of the 1st and 3rd appellants, Shimran Shiyam, was called by the defence to prove that in fact the raid was video recorded. They further submitted that said video was kept in the custody of the PNB. Accordingly a video tape was produced from Police custody by OIC Balachandra and it was marked as '2V1A'. However the Learned High Court Judge did not allow it to be produced in evidence. The position of the prosecution

was that the productions that found in the raid were video recorded at the PNB by PS Karunatilleke (Defence witness) [Vol. 3 – pages 471, 472]. Even PS Karunathileke admitted that a video was made at the presence of OIC Amarajith, but it was done at the PNB and not during the raid.

The Learned High Court Judge by order dated 28.02.2007, refused the application of defence to produce the video as evidence since it was not admissible under provisions of the Evidence (special provisions) Act No.14 of 1995. The defence moved in revision to this Court, against said order of refusal by the Learned High Court Judge, under case No. **CA (PHC) 39/2007 (REV)**. This Court affirmed the order of the Learned High Court Judge, and held that the video was not admissible under section 4(2) of the Evidence (special provisions) Act No.14 of 1995 due to the following reasons;

i. The evidence led by both the prosecution and the defense prove that there was no contemporaneous recording of the raid.

ii. The evidence clearly establishes that whatever recording that was made (filming the productions at the PNB) was not kept in safe custody at all material times.

iii. Insufficient precautions were taken to prevent the possibility of such recordings being altered or tempered with (counsel for the accused have admitted that they were in possession of such recording or parts thereof).

The Learned President's Counsel for the 2nd appellant contended that this court is not bound by the decision of in case No**. CA (PHC) 39/2007 (REV)** since the said decision was decided *per incuriam*. The rule of *per incuriam* is elaborated in **Halsbury's Laws of England (4th edition – vol. 26 – Judgments and Orders; Judicial Decisions as Authorities)** as follows;

"a decision given when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords Decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statue or rule having statutory force". (Pages 297 & 298)

In the case of **Morelle Ltd. V. Wakeling and another (1955) 2 QB 379, [1955] 1 All ER 708**, it was held that,

"As a general rule, the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of of some authority binding on the court concerned: so that in such cases some part of the decision, or some step in the reasoning on which it was based, is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene, M. R., of the rarest occurrence. In the present case it is not shown that any statutory provision or binding authority was overlooked..."

It is observed that the rule of *per incuriam* has been developed over a period of time. Now it has been widened to include more instances like absence of citing contrary authorities, failure to cite the relevant authorities, procedural errors, failure to bring to the attention of court a manifest and obvious error of fact based on an important item of evidence and etc. [*vide* ***C. Kodeswaran V. AG(1969) 72 NLR 337 at 34, R V. Northumberland Compensation Appeal Tribunal Ex Parte***

Shaw (1951)1 All ER 268, Mst. Karmi V. Amru & Others (1972) 4 SCC 86, Sivapathalingam V. Sivasubramanium (1990) 1 SLR 378, Batuwatta Piyaratne Tissa Thero V. Liyanage Noris Jayasinghe –SC39/73 – SC Minutes 6/2/1976]

I am of the view that none of the above instances could be found in the judgment of **CA (PHC) 34/2007 (REV).**

The Learned President's Counsel for the 1st appellant submitted that this Court is not precluded from considering the question of law as to whether, independent of the Special Provisions, the evidence could have been produced under the primary Evidence Ordinance. Accordingly it was contended that even though section 03 of the Evidence Ordinance confines the definition of 'evidence' to oral or documentary evidence, section 60 and 165 of the Evidence Ordinance empower Court to permit the production of any 'material thing' or 'thing' respectively. The Learned President's Counsel submitted following cases in support of this contention;

1. **Abu Bakar V. Queen [54 NLR 566]**
2. **Karunaratne V. The Queen [69 NLR 10]**
3. **Shaul Hameed and another V. Ranasinghe and others (1990) 1 Sri LR 104**
4. **King V. Dharmasena [50 NLR 505]**

In the case of **Abu Bakar V. Queen [54 NLR 566]**, Court admitted a recording of a speech made at a public meeting under section 11 of the Evidence Ordinance provided that it was correctly recorded and the machine was properly functioning. It is noteworthy that as per the Court, in the said case, the prosecution adduced evidence to the effect that the speech in question was in fact electrically recorded. The Court in the said case observed that;

"There was evidence before the jury, about the working of the wire recorder, upon which it was open to them to hold that the instrument could accurately record a speech and reproduce it ; and there was also evidence that it was operated on the occasion in question by a police sergeant so as to reward on a particular spool of wire (PI) almost the entirety of a speech made by the appellant and the whole of another speech that immediately preceded it and also the announcements that were made by the chairman of the meeting before these two speeches. According to Wijesena's evidence the speech that he took down purported to be one made by a person who was announced as Abu Bakr. The police sergeant who had operated the instrument at the time of the speeches gave evidence to the effect that it was he who operated it later to reproduce the sounds recorded on PI so that Wijesena might take down the appellant's speech as reproduced end that he identified the appellant's voice on that occasion. Another police sergeant, too, gave evidence to the effect that he was present on both occasions and that he too identified the voice that was reproduced as the voice of the appellant."

Therefore it is manifested that the accuracy of the recording was proved before the Court in order to obtain the permission of the Court.

In the case of **King V. Dharmasena [50 NLR 505],** it was held that,

"The other matter on which Mr. Lekamge relied as misdirection was his contention that the learned Judge allowed some photographs to be produced in evidence. In considering the admissibility of these there are always two questions to be met— competency, and materiality and relevancy. If the photograph is an accurate and honest representation of the facts one then comes to consider whether it is material and relevant, whether the matter

pictured will genuinely and properly aid the Jury in determining the true facts. If it passes both tests it becomes good evidence. A photograph comes in as a part of the testimony; it is used to explain or make oneself intelligible to a Judge; it is referred to in section 3 of the Evidence Ordinance..."

These cases amply demonstrate that even for this evidence to be admissible under section 03 or section 11 of the evidence Ordinance, the party who produces such evidence was required to prove its accuracy, competency and genuineness. It is apparent that the Court was conscious to check whether such material passes the relevant tests in order to be admissible as evidence. However in the instant case, the prosecution constantly denied the raid being video recorded and even the defence witness (PS Karunathilaka) testified that the video recording was done at PNB, subsequent to the raid. At the same time, it is paramount to note that the technology has been developed over the years and certainly a video or a photograph can be edited to demonstrate a completely different picture than the original. People or things in pictures and videos could be removed and/or inserted using many types of editing apps and tools. Therefore the Learned High Court Judge was correct in considering the possibility of tampering with utmost importance as required in section 04 of the Evidence (special provisions) Act.

I observe that in the case of **CA (PHC) 34/2007 (REV)**, the Court was of the view that consequent to the enactment of Act No. 14 of 1995; any item relating to contemporaneous recording should be subject to these evidentiary provisions. Section 2 of the Evidence (Special Provisions) Act refers to the application of the Act as follows;

"Notwithstanding anything contained to the contrary the Evidence Ordinance or any other written law the provisions of this Act shall be applicable in respect of any latter provided for herein."

Therefore I am of the view that the appellants are not allowed to pick and choose an advantageous section or a Statute for them to produce contemporaneous recording when there is a clear provision to govern the same. In **CA (PHC) 34/2007 (REV),** Justice Imam held that,

> *"After the Evidence (Special Provisions) Act 14 of 1995 came into operation admission of video recordings is solely governed under the provisions of the said amendment"*

It is observed that without fulfilling the conditions laid down in section 4, the party proposing to produce the contemporaneous evidence cannot do so. Case law decided prior to the enactment of Act No. 14 of 1995 would not be applicable to the instant matter and it was correctly considered by the Learned High Court Judge as well. Therefore the contention of the Learned President's Counsel for the 1st appellant, independent of the Special Provisions the evidence could have been produced under the primary Evidence Ordinance, should necessarily fail.

At this juncture it is noteworthy that even though the appellants appealed against the judgment dated 28.02.2007 to the Supreme Court, it was withdrawn without proceeding. The said judgment of **CA (PHC) 34/2007 (REV)** is now reported in 2007 Vol. 1 of the Sri Lanka Law Reports at page 276. Therefore the said judgment remains unchallenged and is final in relation to the issue of 'video evidence' in the instant case.

Accordingly the Learned ASG for the respondent averred the plea of 'res judicata' as the issue of 'video evidence' has already been determined by a competent court having jurisdiction and the parties being the same.

The Learned ASG submitted the case of **Karunaratna V. Amarisa [1964] [66 NLR 567]** in which it was held that,

"The doctrine of Res Judicata, based on the two Latin maxims "Nemo debet vis vexari pro una et eadem causa" and "Interest republicae ut sit finis litium", is a plea which bars subsequent action on the same cause of action between the same parties on the ground that the matter has been judicially determined and is a safeguard against unnecessary litigation over the same matter. The doctrine operates when the following essentials are present;

1. *There must be a judgment of a court of competent jurisdiction (Ibrahim Baay v. Abdul Rahim [1 (1909) 12 N. L. R. 177.]*
2. *There must be a final judgment (Fernando v. Menika (2 (1906) 3 Bal. 115).*
3. *The case must have been decided on its merits (Annamalai Chetty v. Thornhill 3 [3 (1932) 34 N. L. R. 381]).*
4. *The parties must be identical or be the representatives in interest of the original parties (Sivakolunthu v. Kamalambal [4 (79,53) 56 N. L. R. 52)].*
5. *The causes of action must be identical (Dingiri Menika v. Punchi Mahatmaya 5 [5 (1910) 13 N. L. R. 59.])".*

I observe that the Learned High Court Judge allowed the defence to lead evidence to prove that the requirements of section 04 of the Act No. 14 of 1995 were fulfilled. Accordingly an inquiry was held in which the defence listed 4 witnesses, but only led evidence of the witness No. 01, namely Shimran Shiyam (daughter of the 1st and 3rd appellants). On 28.02.2007, the Learned High Court Judge made an order refusing to allow the application of defence to produce the video as evidence. Being aggrieved by the order of the Learned Trial Judge on the issue of video, they challenged the said order by way of revision and this Court delivered its judgment after a careful consideration of arguments made by the parties. The appellants

appalled to the Supreme Court but did not maintain the appeal. They have withdrawn the said application without reserving the right to file a fresh application.

Considering above, I am of the view that if the order dated 28.02.2007 was erroneous, the Supreme Court was the accurate Court to challenge it. We are not inclined to re-consider an order given by this Court when it was not proven to be of *per incuriam.*

The Learned President's Counsel for the 1st appellant submitted that there were flows in the 'chain' relating to the dispatch and receipt of productions to and from the Government Analyst. It was argued that some of the seals of 'P1 had been broken when produced at the trial in the High Court. As per the evidence led by the prosecution, SI Rajakaruna received the productions from IP Liyanage. At the PNB, the productions were marked and were entered in the production register. Thereafter those were sealed with the left thumb impression of the 1st appellant, his signature,date and the signature of IP Liyanage were placed on a white sheet of paper which was attached to each of the productions. All these productions had thereafter been handed over to SI Rajakaruna [vol. 2 – page 108] SI Rajakaruna has confirmed that when he received the productions from IP Liyanage, all the productions had been sealed [vol.2 – page 553]. SI Rajakaruna had put the said productions to a strong box and kept them in his personal custody [vol.2 – page 561]. Thereafter on 02.12.2003, SI Rajakaruna had handed over the productions, namely PR 96, 97, 98, 100, and 101 to the Assistant Government Analyst Chandrani [vol.2 – pages 560 - 564]. The Assistant Government Analyst was called to testify as PW 09 and she testified that she took over the productions as stated in the covering letter & the seals were intact [Vol.3 - page 68, 88].

In the case of **Perera V. Attorney General (1998) 1 Sri. LR 378** it was held that,

"It is a recognized principle that in a case of this nature, the prosecution must prove that the productions had been forwarded to the Analyst from proper custody, without allowing room for any suspicion that there had been no opportunity for tampering or interfering with the production till they reach the Analyst. ***Therefore it is correct to state that the most important journey is the inwards journey because the final Analyst report will be depend on that.*** *The outward journey does not attract the same importance."*

In light of above it is understood that the most important journey is the inwards journey. Our Courts took up that position since the final Analyst Report will depend on the inwards journey. In the instant case, it appears that the seals had been intact until the Government Analyst's Department had received the productions. Greater importance cannot be attached to any damages that would have been caused to '**P1**" in its outward journey to the court since it has no impact on the prosecution case.

It was further contended for the 1st appellant that SI Rajakaruna had handed over the parcel to one Chandrani Ukwatte at the office of Government Analyst and no person by that name was called as a witness. Instead the prosecution called Kokawela Pathiranage Chandrani who was an Assistant Government Analyst and she had signed the Report [Vol.3 – Page 63]. Accordingly it was contended that there is a gaping hole with regard to the chain of productions until the office of Government Analyst.

I observe that SI Rajakaruna refers to the officer who issued the a document called as 'සංඥාව' upon acknowledgement of the productions as Chandrani Ukwatte and the Assistant Government Analyst, Kokawela Pathiranage Chandrani, testified and corroborated that she received the productions by the PNB through SI Rajakaruna. Thereafter she had compiled and signed a report which was marked

and produced by the prosecution as P 29. Further I observe that the Assistant Government Analyst identified signatures in both those documents i.e. in the 'සංදේශය' and in the report to be that of hers.

The Learned ASG for the respondent brought to the attention of this Court that the Learned Trial Judge had referred to the Assistant Government Analyst as Chandrani Ukwatte and Ukwattage Chandrani when he analyzed the evidence of SI Rajakaruna [Vol. 3- page 669]. The Learned Trial Judge had referred to the witness as Kokawela Pathiranage Chandrani when he analyzed the evidence of the Assistant Government Analyst [Vol. 3 – page 688]. Further it is noteworthy that this question was not raised in the High Court and the Learned Counsel for the 2nd and 3rd appellants did not cross-examine the said witness, the Assistant Government Analyst. Accordingly the Learned High Court Judge held as follows;

> "රස පරීක්ෂක කාර්යාලයේදී සිදු කෙරුණු පරීක්ෂණයට අදාළ කරුණු හැර වෙනත් කිසිදු කරුණක් පිළිබඳව පළවෙනි විත්තිකරු වෙනුවන් හරස ප්‍රශ්න නඟා නොමැත. එබැවින් භාණ්ඩ සම්බන්ධව ඉදිරිපත් කරනු ලැබූ සාක්ෂි සියල්ලක්ම කිසිදු අභියෝගයකින් තොරව පවතී. දෙවන විත්තිකරු වෙනුවෙන් සහ තුන්වෙනි විත්තිකරු වෙනුවෙන් රස පරීක්ෂකවරිය හරස් ප්‍රශ්නවලට භාජනය කර නොමැත. එබැවින් දෙවන සහ තුන්වෙනි විත්තිකරුවන්ට එරෙහිව රස පරීක්ෂකවරියගේ සාක්ෂි අභියෝගයකින් තොරව පවතී. ඒ අනුව රස පරීක්ෂකවරියගේ සාක්ෂිය පිළිබඳව කිසිදු පරස්පරතාවයක් හෝ ඌණතාවයක් මතුකර දැක්වීමට විත්තිය සමත් වී නොමැත..." (Vol. 3 – Page 691 & 692)

Therefore I am of the view that all these materials amply demonstrate that the officer who acknowledged the productions and the one who subsequently analyzed the productions to be the same.

The Learned President's Counsel for the 2nd appellant submitted that the Learned High Court Judge failed to consider evidence favourable to the defence that the IBs pertaining to this case maintained by the PNB were tampered. The Learned High Court Judge also made order on 03.07.2006, directing that the IB concerned which was in court custody by then to be sent to the EQD for examination and report on six specific questions. The EQD report was never brought to court and was not made a part of the case, nor is it found in the record. Therefore it was argued that the EQD report which was of relevance to this case which ought to contain material favourable to the appellants has been shut out by the Learned Trial Judge and there is a reasonable doubt with regard to the truthfulness of the Prosecution's case.

This question was raised during the trial and at the invitation of the prosecution, the Learned Trial Judge had carefully examined the original IB and had made his observations at pages 346, 513, 608, of the brief. He also ordered the IB to be kept in the custody of court [Vol. 2 – page 346].

The Learned ASG for the respondent contended that the proposition of the defence on alleged tampering of the IB should be negated since registers and Information Books of the police officers are subject to supervision by supervising officers and there is possibility of the Information Book being used by more than one officer of the PNB. Therefore it was submitted that any alteration interleafing would quickly be detected on inspections by supervising officers. I observe that IP Liyanage has explained that the IB is used for several purposes [vol. 2- page 339, 340]. Further I observe that the Learned Trial Judge had the opportunity of examining the IB and

therefore he was in a better position to decide on this issue than this Court. Therefore I do not interfere with his finding that the issue of IB is only an imagination and has no bearing on the case for the prosecution [Vol.3 - pages 654 & 655]

The Learned President's Counsel for the 3rd appellant submitted that the prosecution did not prove beyond reasonable doubt that the 3rd appellant had knowledge of the Heroin under the bed and her presence in the room is not sufficient to prove knowledge. It was argued that the 3rd appellant was not in home at the time of the alleged trafficking and therefore she had no knowledge. The Learned President's Counsel further submitted that the 3rd appellant being a Muslim woman was under the command of her husband (the 1st appellant).

The Learned President's Counsel submitted following case law and I list some of them as follows;

1. **V. Sivadasan & V. Pavadasan V. The Attorney General [CA 46/2008 decided on 13.07.2012]**
2. **The Queen V. M.G. Sumanasena [66 NLR 350]**
3. **Muniratne and others V. The State (2001) 2 Sri L.R. 382**
4. **Jaharlal Das V. State of Orissa [1991 SC 1388]**
5. **Dunuwila V. Poola [40 NLR 412]**
6. **Sumithra Premarathne V. Republic of Sri Lanka (1998) 3 Sri L.R. 342**

I perused the above decisions and in the case of **V. Sivadasan & V. Pavadasan V. The Attorney General [CA 46/2008 decided on 13.07.2012],** two brothers were arrested when they were coming out from a Kovil and the 1st accused carried a parcel alleged to have contained heroin. The 2nd accused did not have anything in his possession. The High Court Judge convicted both accused persons for

possession and trafficking of heroin. However the conviction of the 2nd accused was set aside by the Court of Appeal. It was held that,

> *"The evidence fell short of proving beyond reasonable doubt that the 2nd accused-appellant had the knowledge of the contents of the parcel and that he deliberately attempted to rescue the 1st accused-appellant and the parcel of heroine. The evidence falls very short of proving beyond reasonable doubt that the accused had been engaged or attempting to traffic heroine...*
>
> *With regard to the 2nd accused-appellant I must emphasize that although he was coming out of the Kovil with the 1st accused appellant. He was not in possession of the parcel of heroine. On the other hand Kovil was a public place and the 2nd accused-appellant was the brother of the 1st accused - appellant. Therefore they had a right to be together and there was nothing unusual about that..."*

It is noteworthy that unlike in the **V. Sivadasan case,** the 3rd appellant was not in a public place but in their own bedroom. Therefore I am of the view that the 3rd appellant cannot completely deny knowledge about the things inside their room.

As per the dock statement of the 3rd appellant, she is a daughter of a doctor and had studied up to the Advanced Level examination [Vol.3 - page 511]. She drives their children to and from school and takes them for tuition as well. She further stated that she helps children with their homework of school. This evidence amply demonstrates that the 3rd appellant is an educated person and quite independent lady compared to traditional Muslim women in the society. As per the dock statement and the evidence of her daughter, the 3rd appellant had gone marketing with their servant Sinniah Thirumurthi alias Kannan on the date of raid [vol. 3 – page 512, 564]. She freely moves about, deals with the society and unlike other

traditional Muslim women, she even accompanies male servants to go out when necessary.

In the said **Dunuwilla case** (supra) both husband and wife were convicted of the same offence, possession of toddy and the wife was acquitted in the appeal. However in the same case it was held that,

> *There can, no doubt, be cases where a wife occupying a house with her husband, may be held to be in possession of something that is the subject matter of an offence.*

Upon perusal of the said decision, it is understood that Soertsz, A.C.J did not intend to create a solid rule that every wife must be free of liability with regard to the restricted or prohibited materials that are found inside a house occupied by both husband and wife. Further I observe that the facts of Dunuwilla case and the instant case are different and therefore it is not justifiable to apply the same rules in a way that would create an absurdity. The Learned ASG for the respondent contended that unlike the wives in cases of **Dunuwila** (supra) **& Samaraweera V. Bee Bee [4 CLW 48],** the cases cited by the Learned President's Counsel for the 3rd appellant, she was very much in a position of control. I perused the said judgments and I wish to answer the said contention of the Learned ASG in affirmative. It is noteworthy that family relationships have been developed to an extent where both husband and wife are in equal positions than it used to be in 1940's when most of the submitted cases were decided.

In the instant case the 3rd appellant was convicted of abetting the 1st appellant as well. **Section 54B of the Poisons, Opium, and Dangerous Drugs** reads that;

> *"Any person who abets the commission of or who attempts to commit or does any act preparatory to or in furtherance of the commission of any*

offence under section 54A shall be guilty of such offence and shall be liable on conviction to the punishment provided for such offence."

In **WORDS AND PHRASES legally defined**[1], 'aid and abet' was defined by case law as follows;

"...Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent it and had the power so to do, or at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he willfully encouraged, and so aided and abetted. But it would be purely a question for the jury whether he did so or not..." ***R V. Coney (1882) 51 LJMC 66 at 78, CCR, per Hawkins J***

'I...repeat what I said, with the assent of the other members of the Court, in ***Johnson v Youden [[1950] 1 All ER 300]*** *"a person cannot be convicted of aiding and abetting the commission of an offence if he does not know the essential matters which would constitute the offence". If a person shuts his eyes to the obvious, or perhaps, refrains from making any inquiry where a reasonably sensible man would make inquiry, I think the court can find that he was aiding and abetting'* ***Davies, Turner & Co Ltd. v Brodie [1954] 3 All ER 283 at 286****, per Lord Goddard CJ"*(Emphasis added)

Section 100 of the Penal Code reads that;

"A person abets the doing of a thing who-

Firstly- Instigates any person to do that thing; or

[1] John B Saunders , *WORDS AND PHRASES legally defined*, Vol.1, 3rd Edn., London Buttersworth, 1988, p. 64

Secondly- Engages in any conspiracy for the doing of that thing; or

Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing."

In light of above it is understood that even non-action would amount to aiding and abetting in certain circumstances.

The Learned President's Counsel for the 3rd appellant submitted that there are three possibilities when the alleged quantity of heroin could have been brought in to appellant's house as alleged by the prosecution i.e.,

1. The heroin could have been brought in to house a day before the raid
2. The heroin could have been brought in to house before the 3rd appellant left the house to drop children to school
3. The heroin could have been brought in to house after the 3rd appellant left the house to drop children to school and before the PNB officers arrived at Ward place at about 7.10am.

In the case of **The Queen V. M.G. Sumanasena [66 NLR 350],** it was held that,

"...Suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence... The burden of establishing circumstances which not only establish the accused's guilt but are also inconsistent with his innocence remains on the prosecution throughout the trial and is the same in a case of circumstantial evidence as in a case of direct evidence.

Facts of that case are not much clear but it dealt with burden of proof.

At this point the Learned ASG for the respondent raised the following argument. I wish to reproduce it as follows;

> "According to IP Liyanage, the house had been searched but drugs had not been found at any other place in the house except from the bed room of the 1st and 3rd appellants. Shimran Shiyam, the daughter of the 1st and 3rd appellants, corroborated that the room in issue to be the bed room of her parents. This shows that the 1st and 3rd appellants had kept the drugs and accessories in their safe custody including the sales proceeds. The 3rd appellant who returned from her morning drive was in the bed room when the PNB officers walked in with her husband the 1st appellant. As submitted earlier, having collected the two bags from the 2nd appellant, the 1st appellant had taken about 10 minutes to re-appear. He was not empty handed but carried a bag containing drugs. Thus, it is evident that the 1st appellant had collected the drugs from the room where the 3rd appellant was present and is a clear indication of the knowledge of the 3rd appellant of the contents of the bag that was securely stored under their bed."

In the case of **Jaharlal Das V. State of Orissa [1991 SC 1388],** it was held that,

> *"The Court must satisfy itself that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused..."*

In the case of **Warner V. Metropolitan Police Commissioner (1968) 52 Cr. App.R.373, (1969) 2 A.C.256,** it was held that,

> *"the section did not contain the word 'knowingly' Pollock C.B said that section 3 applied to the case 'whether the party knows it or not' Parke B.*

said at p. 417; 'with respect to the offence itself, I have not the least doubt that the ordinary grammatical construction of this clause is the true one. It is very true that in particular instances it may produce mischief, because an innocent man may suffer from his want of care in not examining the tobacco he has received, and not taking a warranty; but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so

"... the prima facie assumption is discharged if he proves (or raises a real doubt in the matter) either (a) that he was a servant or bailee who had no right to open it and no reason to suspect that its contents were illicit or were drugs or (b) that although he was the owner he had no knowledge of (including a genuine mistake as to) its actual contents or of their illicit nature and that he received them innocently and also that he had no reasonable opportunity since receiving the package of acquainting himself with its actual contents".

The 3rd appellant in the instant case was not a servant and she was in a position to control the affairs at home. Unlike the wives in some of the cases submitted by the Learned President's Counsel, the 3rd appellant was in a better position to be aware of her husband's actions as demonstrated above. As it was observed in the **Warner case** (supra) the omission of 'knowledge' in the relevant section should also be considered at this juncture. Therefore I wish to answer the above contention of the Learned ASG in affirmative. Further I observe that her abetment in trafficking could be inferred from the fact that the bag containing heroin was stored right under the bed which was inside the room she occupied. Even at the time of detection, she was occupying the said bedroom. This question was correctly evaluated by the Learned High Court Judge in his judgment at pages 84 to 87 [Vol.

3 - pages 700 – 703] Therefore the grounds of appeal, 01 to 04, raised by the Learned President's Counsel for the 3rd appellant should fail.

Both the Learned President's Counsel for the 1st and 2nd appellants submitted that the Learned High Court Judge failed to take into account that certain inter-say contradictions occasioned a failure of justice. They contended that there had been misdirection with regard to the burden of proof. It was further contended that the Learned High Court Judge failed to consider certain items of evidence that cast a doubt as to the credibility of the witnesses regarding the manner in which the appellants were arrested. The Learned President's Counsel for the 2nd appellant contended that evidence of Latheef, the three-wheeler driver who saw the incident of abduction of the 2nd appellant and the evidence of defence witness Sunil Fonseka alias Patta's were unreasonably rejected by the Learned High Court Judge.

The defence witness, abdul latheef, had known the 2nd appellant for about 6 months. According to him some people had come in a white van on 28.11.2003 around 9.30am and had pointed a pistol at the 2nd appellant and thereafter had pushed him to the rear seat of the trishaw [vol. 3- pages 405, 406, 407]. However the Learned ASG for the respondents submitted that said witness Latheef contradicts defence witness Sunil who testified that the 2nd accused was assaulted, hand cuffed and was put into the van [vol. 3 –page 285]. It is noteworthy that said Latheef did not even inform the police about the alleged abduction that had taken place in broad day light. At this point, the Learned High Court Judge considered how Latheef was able to note down the trishaw number of the 2nd appellant given that the white van was going behind the said trishaw. Accordingly the Learned High Court Judge was of the view that the version of the Latheef was questionable and not creditworthy.

Defence witness Sunil testified that he made a confession to the Magistrate of Maligakanda under case number 31198. The reason for the statement was an alleged threat he had received during his period of remand. However, as per section 127 of the Code of Criminal Procedure Act No 15 of 1979 statements or confessions can be made only during the stage of investigation. Even the Learned Magistrate under cross-examination admitted that he was misdirected in recording the said confession since he was not legally empowered to do so. Therefore the Learned High Court Judge was correct in rejecting the evidence of Sunil Fonseka since it was a well-planned move in making him to be a competent witness for the defence.

It was contended that IP Amarajith became angry with the 1st appellant since he refused to pay Rs. 25,00,000/=as requested by said IP Amarajith. This incident had happened in 1993 [vol. 3 – page 248] whereas the detection was in 2003. In this regard, the Learned ASG for the respondent raised the question as to if Amarajith had wanted to put the 1st appellant in trouble, would he have waited for 10 years to do that? I do not think so. Further there is a doubt as to whether the PNB officers would have done a 'staged detection' as alleged by the defence, in front of three eye witnesses, i.e. Sunil, Sanjeewa and Kelum as mentioned earlier.

I observe that the Trial Judge has considered the opportunities available for the appellants to have complained against the illegal arrest as alleged by them. Accordingly it was observed that despite their claim of non-involvement in unauthorized possession and trafficking of drugs, they had not complained about it to any authority. I am of the view that the Learned High Court Judge was correct in considering the failure to file Fundamental Right applications by the appellants to the Supreme Court given that they had the ability to obtain the services of senior

experienced legal practitioners for the instant case. Therefore I see no merits in this argument raised by the Learned President's Counsel for the 2nd appellant.

It was argued for the appellants that the Learned High Court Judge failed to consider the physical impossibility of retrieving the travel bag allegedly contained heroin under the bed. IP Liyanage described bed found in this room was to be a large bed [vol. 2 – page 78] and PS Rajitha explained the bed to be larger than a single size bed [vol.2 - page 800] and to be a luxury type [vol.2 – page 1040]. The size of the bag that was found under the bed was about 2 ½ feet long and 23 inches in width. The height was about 10 inches. At the PNB this bag had been marked as S 16 and was included in PR 98 [vol. 2 – page 188 & 190] and it was marked as P4 in the High Court Trial. IP Tennakoon had pulled the bag out from the handle [vol.2 – pages 326, 801, 1021, 1037, and 1048]. It was suggested to IP Liyanage under cross examination that the gap between the floor and the bed was only 6 inches in view of a plank that was fixed to the bed. This fact was **categorically denied** and refuted by IP Liyanage the chief raid officer. The Learned ASG for the respondent brought to the attention of this Court that in the dock statement of the 3rd appellant, she stated that sequel to the cross examination of IP Liyanage on the issue of the bed, she happened to measure it on the same day at home and it is a mystery as to how the defence counsel knew the details and dimensions of the bed, which the 3rd appellant was unaware of.

A bed was brought to court by the defence, when PS Rajitha was giving evidence and was marked and produced as 1V12, but Rajitha could not clearly identify it to be the same bed [vol.2 – pages 1044, 1045]. The Learned High Court Judge considered the effort of the defence to challenge the finding of the bag underneath the bed and was of the view that the defence failed to produce any evidence in establishing the bed to be the same bed that had been in the bed room of the house

of 1st and 3rd appellants [vol. 3 – judgment pages 757, 758]. Therefore I see no merits in this argument of the appellants.

The Learned ASG for the respondents submitted that there is no evaluation and finding by the Learned Trial Judge on Count 4 against the 3rd appellant and therefore pleaded to convict the 3rd appellant on count 4 and that she be sentenced as provided by the Statute. I observe that the Learned Trail Judge had omitted to enter a finding on the said 4th count. This issue was pointed out by the Learned ASG earlier and therefore the Learned President's Counsel was allowed to make submissions on this point and even filed written submissions to that effect. The appellants are invoking the jurisdiction of this Court under Article 138(1) of the Constitution read with section 331 of the Criminal Procedure Act. This Court is vested with the appellate jurisdiction to correct all errors in fact or in law committed by the High Court *inter alia* as per Article 138(1) whereas Article 139(1) of the Constitution stipulates that in exercising its appellate powers, this Court shall affirm, reverse, correct or modify any order, judgment, decree or sentence according to law. Furthermore, section 335 of the Code of Criminal Procedure Act No 15 of 1979 lays down the powers exercised by this Court in determining the appeals in cases where trial was without a jury.

The Learned ASG submitted cases of **Emperor V. Jagannath Gir and others AIR 1937 All 1937** and **Ragunath and others V. Emperor AIR 1933 All 565, 145 Ind Case 849**, where the Indian courts have entered a conviction when the trial judge has omitted to do so. In **Ragunath and others V. Emperor (supra)** it was held that,

> *"The ruling goes further than is necessary for the purpose of the present case where there is no express acquittal under Section 147 but merely an omission to record a conviction under that section. This ruling was followed*

by a Single Judge of this Court in Emperor v. Sardar (1912) 34 All 115 Here it was held that an appellate Court can under Section 423, Criminal P.C., in an appeal from a conviction alter the finding of the lower Court and find the appellant guilty of an offence of which the lower Court has declined to convict him..."

Therefore it was held that the High Court, under section 423 of the Criminal Procedure Code, (corresponding provision in Sri Lankan Code of Criminal Procedure Act No. 15 of 1979, section 335) is empowered to convict the accused under section 147 of the Indian Penal Code inasmuch there was no acquittal on the charge under that section.

In the case of **Ambika Prasad and another V. State (Delhi Administration) (2000) SCC Cri. L 522** the Indian Supreme Court observed that,

'a criminal trial is meant for doing justice to the accused, victim and the society so that law and order is maintained. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties..."

As I have already evaluated above, the prosecution has proved that the 3rd appellant had the knowledge of heroin being stored inside the house and therefore she was in joint possession of heroin together with the 1st appellant. Upon consideration of evidence, it is manifested that the 3rd appellant was on par with her husband. Therefore exercising the powers vested in this Court in terms of Article 138 and 139, I convict the 3rd appellant for the 4th count i.e. for possession of 7.796 kg of heroin (joint possession), an offence punishable under section 54B read with 54A of the Ordinance.

Another argument raised on behalf of the appellants was that the Learned High Court Judge misdirected with regard to the burden of proof and failed to consider certain inter-say contradictions which resulted in a failure of justice.

Section 101 of the Evidence Ordinance reads that;

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*
>
> *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

Section 102 of the Evidence Ordinance reads that;

> *"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all of were given on either side."*

In the **Sarkar on Evidence**[2]**,** the burden of proof is elaborated as;

> *"The phrase 'burden of proof' is not defined in the Act. It has two distinct and frequently confused meanings; (1) The burden of proof as a matter of law and pleading – the burden, as it has been called of establishing a case. This burden rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. It is fixed at the beginning of the trial by the state of the pleadings, or their equivalent, and it is settled as a question of law, remaining unchanged under any circumstances whatever. This rule is embodied in s 101. (2) The burden of proof as matter of adducing evidence. The burden of proof in this sense is always unstable and may shift constantly, throughout the trial, according as one scale of*

[2] M.C. Sarkar & S.C. *Sarkar, Sarkar's Law of Evidence*, Vol. 2, 14th Edn., Wadhwa and Company Law Publishers, p.1338

evidence or the other preponderates [Pickup V. Thames Ins Co, 3 QDB 549, 600; Wakelin v L&S W Rly Co.,.....]

In **The Law of Evidence**[3], it was emphasized that;

"...A party asks for a judgment on the basis of a legal right or liability. The substantive law lays down the requirements of that right or liability. He must prove the existence of all facts which bring him within the substantive law on that subject. The burden of proof lies on him [Dickinson vs. Ministry of Pensions 919530 1 QB 228; (1952) 2 AER 1031 at 1033; Hoffmann & Zeffertt, op. cit., 3rd Ed., 396]...

Section 101 is based on the rule, ***ei incumbit probation qui dicit, non qui negat.*** *Lord Maugham has said, "it is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons [Joseph Constantine Steamship Line Ltd. vs. Imperial Smelting Corp. Ltd (1942) A.C. 154; (1941) 2 A.E.R/ 165; see also Soward vs. Leggatt (1836) 7 C. & P. 613]"*

In the case of **Ajith Samarakoon V. The Republic [2004] 2 SLR 209,** it was held that,

'The principle laid down in R V. Cochrane and R V. Burdette do not place a legal or a persuasive burden on the accused to prove his innocence or to prove that he committed no offence but these two decisions on proof of a prima facie case and on proof of a highly incriminating circumstances shift the evidential burden to the accused to explain away the highly incriminating circumstances when he had both the power and the opportunity to do so'

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[3] E.R.S.R. Coomaraswamy , *The Law of Evidence*, Vol. 2, Stamford Lake Publication, 2018, p.

In light of above, it is understood that in certain instances such as when a *prima facie* case is proved with highly incriminating evidence, the burden of proof shifts to the other party *i.e.* the accused and he is required to explain it in view of the power and opportunity he has. If the accused is able to create a reasonable doubt in the prosecution case, then he must be acquitted. However in the case of **Abdul Sufan & Ors V. State of Tripura [2010] Cri. L.J. 805 (813)**, it was held that,

> *"Reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense..."*

Now I wish to consider whether such burden was discharged by the prosecution and whether the appellants were able to create a reasonable doubt in the prosecution case.

There were two types of charges under the Poisons, Opium and Dangerous Drugs Ordinance were leveled against the 1st appellant i.e. firstly unauthorized possession of 1.290 kg of heroin (Count 1) and unauthorized possession of 7.796kg of heroin (with 3rd appellant for count 4) and Secondly, trafficking the respective quantities (Counts 2 & 5). The 2nd appellant had faced a single charge of abetment i.e. abetting 1st appellant to traffic 1.290 kg of heroin (Count 3). The 3rd appellant had faced a charge of unauthorized possession (Count 4) of 7.796kg of heroin along with the 1st appellant and for abetting the 1st appellant to traffic the same quantity (Count 6).

As per the evidence, the first quantity of 1.290kg of heroin was found in the exclusive possession of the 1st appellant when he was on the pavement in front of his house at ward place. The 2nd appellant arrived at the house of the 1st appellant in the trishaw bearing registered number GU-4308 and there were two black bags in this vehicle. The 2nd appellant had handed over the said bags to the 1st appellant and thereafter waited in his trishaw until the 1st appellant reappeared carrying the aforementioned white bag with 1.290 kg of drugs inside.

In the case of **R V. Looseley [2001] UKHL 53; 1 Cr. App.R.29 HL**, it was held that,

> *"a drug dealer will not voluntarily offer drugs to a stranger unless the stranger first makes an approach to him, and the stranger may need to persist in his request for drugs before they are supplied..."*

As per the evidence, it is clear that the 2nd appellant was abetting the 1st appellant in trafficking heroin and the 1st appellant would not have brought the restricted drugs to the pavement unless he knew the 2nd appellant. Therefore the Learned Trial Judge was correct in drawing an inference on the fact that the 2nd appellant was abetting the 1st appellant.

Further it is imperative to note that monies of different denominations such as Rs. 1,000/=, Rs. 500/=, Rs. 200/=, Rs. 100/=, Rs. 50/=, Rs.20/=, Rs.10/= totaling up to Rs. 5,18, 850/= was found in the bag that was found under the bed. The Learned ASG for the respondent raised questions as to why a businessman having cash at his residence, would keep it in a traveling bag with heroin and different scales and weights?

In the case of **R V. Wright [1994] Crim. L.R. 55**, 16,000 British pounds (cash) were recovered from the flat of the accused. It was held that,

"The question for decision is whether the finding of such a large amount of cash is a fact which, if proved, makes it more probable that a person suspected of dealing in narcotic drugs, and who is found to be in possession of them, is in possession of them for the purpose of supplying them...no doubt that the finding of a large quantity of cash is capable of being relevant to an issue the jury had to consider in the case, and we reject the submission that this evidence was inadmissible because it was irrelevant'. ***[followed in R V. Grant (1996) 1 CR.App.R 73]***

I observe that it is quite suspicious as to why the 1st appellant had collected small denominations and kept such collection of denomination at home. At the same time, I observe that the 1st appellant never denied that Rs. 5,18,850/= had been recovered from his house and he did not challenge either the recovery of money or the recovery of different scales and weights from his house.

In the case of **State of Himachal Pradesh V. Thakur Dass (1983) 2 Cri.L.J. 1694 at 1701**, it was held that,

"Whenever a statement of fact made by a witness is not challenged in cross examination, it has to be concluded that the fact in question is not disputed, absence of cross examination of prosecution witness of certain facts leads to ***inference of admission of that fact..." [vide Motilal V. State of Madhya Pradesh (1990) Cri. L.J. NOC 125 MP]***

Considering above, I am of the view that the Learned High Court Judge correctly held that the transactions between the 1st and the 2nd appellant too proved that the 1st appellant was involved in trafficking of heroin and the 2nd appellant was abetting him for the same.

In the case of **The Attorney General V. Devunderage Nihal [S.C. Appeal No. 154/10 – decided on 12.05.2011]**, it was observed that,

> *It is a well-established principle that the prosecution is not required to lead the evidence of a number of witnesses to prove its case. In a similar case as the present instance , Jayasuriya J in **A.G. v Mohamed Saheeb Mohamed Ismath C.A.87/97 Decided on 13.7.1999** stated that "There is no requirement in law that evidence of a Police Officer who has conducted an investigation into a charge of illegal possession of heroin, should be corroborated in regard to material particulars emanating from an independent source. Section 134 of Evidence Ordinance states that "No particular number of witnesses shall in any case be required for the proof of any fact. The principle had been applied in the Indian Supreme Court where the conviction rested solely on the evidence of a solitary witness who gave circumstantial evidence in regard to the accused's liability. The Privy Council upheld the conviction entered by the trial Judge and adopted the Judgment of the supreme court in **Muulluwa v State of Madhya Pradesh AIR 1976 S.C.198.** This principle has been adopted with approval and applied in the judgment of G.P.S.Silva J. in **Wallimunige John v The State 76 NLR 488. King v N.SA. Fernando 46 NLR 255.** The principle affirmed is that testimony must be weighed and not counted. Justice Vaithylingam dealing with a bribery charge laid down for the future legal fraternity the principle that even in a bribery case, that there is no legal requirement for a sole witness's evidence to be corroborated. No evidence even of a police officer who conducted a raid upon a bribery charge is required by law to be corroborated. **Gunasekera v A.G. 79 NLR 348**".*

In the case of **Attorney General V. Sandanam Pitchi Mary Theresa [SC Appeal 79/2008 - decided on 06.05.2010]** it was observed that,

> '"*demeanour represents the trial judge's opportunity to observe the witness and his deportment and it is traditionally relied on to give the judge's findings of fact their rare degree of inviolability...*"

In the case of **The AG V. Potta Naufer and others (2007) Sri L.R. 144,** it was observed that,

> '*When faced with contradictions in a witness's testimonial, the court must bear in mind the nature and significance of the contradictions, viwed in light of the whole of the evidence given by the witness'*

It is imperative to note that the Learned High Court Judge had the opportunity of hearing the evidence of the whole trial and had the opportunity of observing the demeanour and deportment of both prosecution and defence witnesses.

In the case of **Dharmasiri V. Republic of Sri Lanka [2010] 2 Sri LR 241,** it was held that,

> *"Credibility of a witness is mainly a matter for the trial Judge. Court of appeal will not lightly disturb the findings of trial Judge with regard to the credibility of a witness unless such findings are manifestly wrong. This is because the trial Judge has the advantage of seeing the demeanour and deportment of the witness..."*

In the case of **State of UP V. Anthony [AIR 1985 SC 48],** it was held that,

> *"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the*

court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the : root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details..."

In light of above, it is observed that undue importance cannot be attached to minor contradictions and discrepancies unless they create a reasonable doubt in the prosecution case. Our Courts have recognized the right of an accused to make an unsworn statement from the dock and a dock statement is capable of creating a 'reasonable doubt 'in the case for the prosecution. However as held in **Queen V. Buddharakkitha Thero 63 NLR 433** and in many other judgments, the analysis and evaluation of dock statements ought to be subjected to the tests like test of consistency, test of probability and test of deliberate falsehood. *[vide **King V. Vellayan 20 NLR 257, Queen V. Kularatne 71 NLR 529]***

In the case of **Queen V. Kularatne (supra),** it was held that,

> *"when an unsworn statement is made by the accused from the dock, the jurors must be informed that such statement must be looked upon as evidence, subject however to the infirmity that the accused had deliberately refrained from giving sworn testimony. But the jury must also be directed that (a) if they believe the unsworn statement it must be acted upon, (6) if it raises a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and (e) that it should not be used against another accused."*

It is observed that dock statements lack evidentiary value compared to sworn evidence. In the instant case, there were contradictions between the dock statements of the three appellants. I observe that the 1st appellant said he accompanied 3rd appellant to the market on that day but the 3rd appellant said she went to the market with a male servant. Further the 1st appellant said that he saw the large traveling bag was brought into the main hall and drugs being packed into it whereas neither the 2nd appellant nor the 3rd appellant stated such thing.

Therefore I observe that the Learned High Court Judge came to the correct conclusion, after evaluating the evidence, that the defence did not create a reasonable doubt and the prosecution has proved its case beyond reasonable doubt against all three appellants.

Before concluding, I wish to remark on the assistance given to this Court by all the Learned Counsel in both parties by tendering comprehensive written submissions and tendering copies of decided cases.

After considering the arguments raised by both parties and perusing the evidence available, I am of the view that the Learned High Court Judge arrived at the correct conclusion by convicting all three appellants for respective charges leveled against

them. As mentioned earlier, I convict the 3rd appellant for the 4th count and accordingly sentence her to life imprisonment. Subject to the above variation, I affirm the findings against each appellant dated 14.12.2007 and the orders of sentences imposed on all three appellants dated 14.12.2007 and 17.12.2007 by the Learned High Court Judge of Colombo.

The appeals bearing No. CA 278/2007, 279/2007 and 280/2007 are hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J

I agree,

JUDGE OF THE COURT OF APPEAL